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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Paul C. Murray,

Petitioner,

v.

Theodore M. Gardner, Special Agent,
Federal Bureau of Investigation, *et al,*

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

A. DID THE CIRCUIT COURT ERR IN RULING THAT SPEECH OF A FEDERAL EMPLOYEE MADE AT A MEETING AT WHICH ALL EMPLOYEES WERE IN ATTENDANCE, AND WHICH SPEECH WAS AT THE REQUEST OF THE MANAGEMENT OF THE OFFICE, WAS NOT ENTITLED TO FIRST AMENDMENT PROTECTIONS?

B. DID THE CIRCUIT COURT ERR IN RULING THAT THE PETITIONER STATED NO DUE PROCESS VIOLATION IN HIS COMPLAINT WHEN IT ALLEGED THAT THE APPELLEES DID NOT FOLLOW AGENCY REGULATIONS AND POLICY TO WHICH THE PETITIONER EMPLOYEE WAS ENTITLED?

PARTIES TO THE PROCEEDINGS

1. Paul C. Murray, a Special Agent of the Federal Bureau of Investigation for more than a decade, is the Plaintiff-Appellant below and Petitioner herein.

2. Theodore M. Gardner, Oliver B. Revell, Barry Laken, James W. Vatter, John Schreiber, and Ivan Ford are co-employees of the Federal Bureau of Investigation, who hold management positions with the Agency, and are the Co-Defendant-Appellees below and Co-Respondents herein.

3. Federal Bureau of Investigation is an Agency of the Federal Government and was the Defendant-Appellees below and is the Respondent herein.

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IN THE

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OCTOBER TERM 1984

Paul C. Murray,

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Theodore M. Gardner, Special Agent,
Federal Bureau of Investigation, *et al,*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Paul C. Murray petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals denying the Petitioner's appeal from the United States District Court for the District of Columbia was entered on August 14, 1984. *Murray v. Gardner, et al,* No. 83-1750, slip op. (D.C. Cir. August 14, 1984). This Opinion is reprinted at page A-1 of the Appendix to this Petition.

The District Court Order entered June 13, 1983, dismissed Petitioner's First Amendment claim which was his second cause of action in his complaint. This Order appears at page A-15 of the Appendix.

The District Court had previously dismissed the Petitioner's first, third, fourth and fifth causes of action in the complaint; *i.e.*, claims based on due process, defamation, conspiracy, and intentional infliction of emotional distress by Order entered March 21, 1983. The District Court's Order appears at page A-16 of the Appendix to this Petition.

JURISDICTION

The Order of the United States Court of Appeals for the District of Columbia Circuit was entered August 14, 1984, affirming the lower Court's dismissal of Petitioner's complaint. A timely Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit is hereby submitted to this Court and jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS

The First and Fifth Amendments of the United States Constitution are set out in the Appendix at A-17.

The pertinent statutes and regulations which govern the procedure for disciplining employees of the Federal Bureau of Investigation (hereinafter referred to as FBI) are set out in the Appendix at A-21.

STATEMENT OF THE CASE

This Petition arises from the dismissal of Paul Murray's lawsuit against his superiors at the Washington Field Office (hereinafter referred to as WFO) of the Federal Bureau of Investigation (hereinafter referred to as FBI) and the agency itself.

The Petitioner, Paul C. Murray, is a former Navy pilot and has been an employee of the FBI for more than a decade. Prior to the incident on which this action is based, he was recognized by the FBI as an excellent or superior employee. Petitioner's complaint alleges violations of his First and Fifth Amendment Constitutional Rights and his common law rights. Jurisdiction was founded upon the existence of Federal question and pendent jurisdiction. The violation of these Amendment rights occurred when retaliatory disciplinary action was taken against Murray for certain statements he made at an all-employees meeting of the WFO of the FBI. The Due Process violations occurred during the disciplinary process.

The complaint was filed on August 25, 1982. On December, 1982, the Respondents filed a motion to dismiss or in the alternative for summary judgment.

The Petitioner filed a motion in opposition to Respondents' motion to dismiss. After oral argument on March 16, 1983, the Court on March 21st dismissed the first, third, fourth, and fifth causes of action on the complaint, *i.e.*, claims based on the due process, defamation, conspiracy, and intentional infliction of emotional distress.

On April 21, 1983, the Petitioner moved for a default judgment due to lack of responsive pleading by Respondents; this motion was denied by the Court on April 28, 1983, and the Court gave the Respondents until April 26, 1983, to file a responsive pleading. On April 26, 1983, the Respondents filed a new motion to dismiss and the Petitioner filed a memorandum in opposition.

On May 11th, the Petitioner moved to amend the complaint as a matter of right or alternatively with leave of Court, and also moved to compel responsive pleadings. Both motions were denied by the Court. The Petitioner also moved on May 11, 1983, to vacate the Order dismissing the first cause of action (due process). This was denied without argument despite Petitioner's request for oral argument.

Further, on May 11th, 1983, the Petitioner filed Notices to take depositions of the Respondents, Vatter, Gardner, Schreiber, and Laken, on June 2nd and 3rd, 1983. On May 27, 1983, the Respondent moved for a protective Order to quash the Notice of depositions, which Notice was granted on June 1, 1983, without opportunity for Petitioner's counsel to argue.

On June 13, 1983, the Court heard argument by counsel on the renewed motion to dismiss the First Amendment claim. The Court took the matter under advisement and filed an Order dismissing the remainder of the complaint (the First Amendment claim) that same afternoon.

Petitioner appealed from the District Court's ruling on September 12, 1983. In an Opinion authored by Senior Judge MacKinnon, the Court of Appeals affirmed the trial Court's dismissal of Petitioner's claim on August 14, 1984. From that adverse ruling, Petitioner timely files for review by this Court.

FACTUAL BACKGROUND

Since the lawsuit was dismissed on the grounds of failure to state a claim, the allegations of the complaint must be taken as true to determine if a recognized claim for relief was alleged. Accordingly, the following summarizes these allegations.

In November, 1981, Petitioner Murray learned of a contingent plan to furlough roughly one-third of the agents in the WFO of the FBI. The plan called for the selection of agents to be furloughed by drawing agent's names from a hat. Petitioner's name had been drawn from the lottery pool. The names of management were excluded from the furlough plan. No other field office used this "lottery" method.

Murray was also informed that there would be a meeting of all WFO enployees (approximately seven hundred) called for the specific purpose of discussing the pros and cons of the "lottery" method. During this meeting, employees were encouraged by management to express their views regarding the proposed furlough. Prior to the meeting, Murray was warned by Repondent, Barry Laken, that expression of his oppsition to the contingency plan could be detrimental to his job status.

During the all-employees meeting, Murray expressed his opposition to the plan and also stated he resented the threats that had been made to keep him quiet. Following the meeting, Respondent, Gardner, ordered Murray to report to Respondent's, Schreiber's, office. Murray's request to be accompanied by a witness to this meeting was denied.

During the meeting in Schreiber's office, Murray refused to change his opinion about the furlough plan and he was ordered to file a report on the alleged efforts to keep him quite.

Murray filed his memorandum regarding coercion by Laken as requested, but was told that his memorandum was unacceptable, unprofessional, bordered on insubordination, and that he was the subject of an administrative inquiry.

An "investigation" was conducted and Murray was notified by letter from Respondent, Oliver Revell, dated January 20, 1983,

that Murray was being considered for suspension without pay for thirty days and was being placed on probation.

In the same letter, Murray was notified that he had several rights including a review by an Executive Assistant Director of the FBI, a written opinion of the Executive Assistant Director of the FBI, and a right to counsel. Murray was later denied these rights during the proceedings and, in fact, when he tried to involve his attorney to the proceedings he was further disciplined.

Eventually, Murray was suspended for fourteen days rather than the proposed thirty days. He was given twice the normal probation period. The fourteen day disciplinary suspension period is the maximum number of days that Murray could have received without entitling him to an appeal to the Merit System Protection Board since a suspension of fourteen days or less is not termed an "adverse action." Murray's attempts to obtain an appeal of the decision to the Director of the FBI, pursuant to FBI regulations, were denied.

All of the actions taken against Petitioner by his superiors were in retaliation for his opposition to the lottery furlough plan which he voiced at the all-employees meeting.

FEDERAI QUESTIONS RAISED

Petitioner seeks review of issues involving the First and Fifth Amendments of the Constitution of the United States which were timely raised below and decided adversely to the Petitioner. The First Amendment and this Court's prior decisions protect employee's speech which addresses matters of public concern. Furthermore, speech which relates *only* to personal interests is afforded First Amendment Protection under "most unusual circumstances." *Connick v. Myers*, 103 S. Ct. 1684 (1983). The District of Columbia Court of Appeals ruled as a matter of law that Peitioner's opposition opinions voiced during the employee conference called to hear such opinions were not protected by the First Amendment. This Court is presented with a unique opportunity to consider and clarify the important question of whether the First Amendment protects the employee from his employer's retaliation when the employee voices his opposition

on issues made public during an open forum set up by his employer.

The Court also has an opportunity to rule on whether the Fifth Amendment affords a Federal employee due process protection in a case which involves a fourteen day suspension without salary. This question was specifically reserved by this Court for decision at a later date in *Bush v. Lucas*, 76 L.Ed.2d 648, 662 n.28 (1983).

REASONS FOR GRANTING THE WRIT

A.

THE CIRCUIT COURT ERRED IN RULING THAT SPEECH OF A FEDERAL EMPLOYEE MADE DURING A MEETING AT WHICH SPEECH ALL EMPLOYEES WERE IN ATTENDANCE, AND WHICH WAS AT THE REQUEST OF THE MANAGEMENT OF THE OFFICE, WAS NOT ENTITLED TO FIRST AMENDMENT PROTECTIONS.

1. Employee's Comments At The All-Employee Meeting Relate To Matters Of Public Concern; Therefore, The Lower Court Should Be Reversed.

Last year in *Connick v. Myers*, 103 S. Ct. 1684 (1983), this Court defined the parameters of protected speech within the government work place. In *Connick*, an assistant district attorney had been fined after she objected to her transfer and distributed a questionnaire to fifteen of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. After she was fired, she filed suit under 42 U.S.C. § 1983 contending that her employment was wrongfully terminated because she exercised a Constitutionally protected right of free speech.

The Court rejected her claim and held that:

> ...when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee

> upon matters only of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency allegedly in reaction to the employee's behavior. 103 S. Ct. at 1689-1690 (footnote omitted).

The Appellate Court in the instant case ruled that the comments Petitioner made at the all-employees assembly to contain nothing, "...that would enrich the public's store of appropriate knoweldge on the operation of the FBI or which would in any way relate to matters of general public concern" and, therefore, did not constitute protected speech. We disagree on the grounds that: a) the disposition of public funds is a public issue; b) the quality of the Federal work force is a public issue; and c) threats made to stifle valid dissent are a matter of public concern.

a. *Disposition of Public Funds is a Public Issue.* The furlough "lottery" on which Petitioner commented is clearly a matter of public concern. It is beyond dispute that expenditure of public funds is a legitimate concern and that employees cannot be disciplined for expression of views on this issue. *Pickering v. Board of Education*, 391 U.S. 563 (1968). This Court can take judicial notice that at Congressional appropriation and authorization hearings not only do agency personnel testify but also representatives of public interest groups and private citizens. Obviously, such decisions affect the disposition of public monies. Petitioner's speech directly relates to the appropriate use of limited public funds. In the case at hand the furlough was mandated as a result of the lapse of Federal funding. Due to the funding problem, the Bureau was in the position of having to decide how best to use the remaining available funds. Headquarters determined that a furlough of employees was appropriate and regional offices were instructed to implement such a furlough. The WFO management elected to draw names from a hat (management was excluded from the lottery pool) to determine who would be furloughed. Management then called an all-employees meeting to be held November 25, 1982, at which approximately 700 or more employees attended. The purpose of

the meeting was to explain the furlough system and obtain feedback regarding it.

Any furlough system is by its very nature a decision as to how public funds are spent since it results in certain individuals and their capabilities being paid and retained on the work force, and other individuals not being paid and, therefore, not performing work for the FBI. Furlough decisions are decisions as to the most appropriate way of spending a budget developed through tax dollars. Just as the speech in *Harlow v. Fitzgerald,* 102 S. Ct. 2727 2727 (1982) constitutes public speech so was the speech of Paul Murray directed toward the most appropriate way to spend public money.

b. *Quality of the Federal Work Force is a Public Issue.*

Just as Petitioner's comments realte to decisions on spending of public monies, so it relates also to the quality of personnel to be maintained on the FBI staff. Certainly the public has an interest in maintaining a quality Federal work force, particularly in an agency which performs the crucial law enforcement function of the FBI. Just as decisions regarding what individuals should be hired into an agency will affect the quality of the performance of that agency, so do decisions regarding what personnel will be *removed* from the work force. As Murray told the all-employees meeting, a furlough plan should consider seniority as a factor. This makes imminent sense because, as a general rule, more senior personnel are more experienced, hence, more valuable to an agency's operations. Surely the Appellees cannot contend that the quality of the Federal work force is not a matter in which the public has a valid interest or concern, nor is there any rationality to an argument that favoring seniority over a lottery system is potentially unbecoming of supervisory authority as in *Connick, supra.* To punish this invited speech with a fourteen day suspension without pay is to send a message that: "If you want to get along, you must go along." A quality work force cannot be maintained by the stifling of dissent. The strong inference from the facts alleged in the complaint is that Petitioner's superiors wanted to flush out the biggest dissenter, in front of the whole work force, trick this dissenter into speaking up under the guise of "invited speech" at an all-employees conference, and then make an example of the him by harshly disciplining him.

The employers might contend that since the speech occurred inside the place of employment, it should not be protected. This argument cannot stand. Just as it was not necessary for the comments in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), to be broadcast outside the work place in order to be deserving of protection, neither is it necesary for Murray's comments to Laken at the all-employees meeting to be spread beyond the work place. In *Givhan, supra*, the comments of the employee were considered protected because they related to allegedly discriminatory practices. The Court held that it was not necessary for these comments to be broadcast publicly and that private communication (in that case, a one-on-one conversation) was protected as well. *Givhan, supra*, at 415. In the present case, the complaint clearly states that Murray's comments were made at a meeting of all WFO employees, called at the request of management, so that employees could voice their views on the lottery furlough.

There is another issue related to the quality of the Federal work force in this case. The defendants perforce msut argue that the Director of an agency should be entitled to call an all-employee conference, ask for opinions on certain matters, and then be permitted to discipline any employee who states views which do not meet with the approval of the agency head by citing a pretense such as poor job performance. If this sad situation were ever to fully develop in the United States, the public would be deprived of a competent and efficient government and would be given instead a government operated by "yes" men. It cannot reasonably be argued that the public has no interest in employees frankly responding to a supervisor's request for comments.

c. *Threats Made to Stifle Valid Dissent is a Matter of Public Concern.* Another matter of public concern contained in Petitioner's speech is intimidation of Federal employees. In this case, the management of the WFO called a meeting of employees

to express views regarding the appropriate selection of agency personnel and the spending of public monies, clearly areas of public concern. Prior to the meeting, Petitioner was told that expressions of his personal views could be detrimental to his career. In other words, an attempt was made to intimidate him and, in fact, the threats were made good.

Incident to the Respondents' attempts to suppress the speech of Murray is the issue of quality and efficency of government operations. It is not in the public interest for employees to be told prior to meetings at which views will be solicited that certain views can be expressed only at risk of hurting the declarant's career. If the Respondents' argument is accepted, group meetings of employees held to ascertain workers' viewpoints will be a sham and the public will be deprived of the benefit that occurs to all organizations when there is a spirit of teamwork, cooperation, and participation, rather than one of threats, tyranny, and vendetta.

This is not a case like *Connick, supra,* where an employee, on her own initiative and without the consent or prior knowledge of management, circulated a questionnaire among fifteen of her coworkers. Here, *management instigated and invited public criticism* of their proposed furlough plan during a meeting attended by the entire seven hundred or more WFO employees. Management's purpose, while perhaps noble and democratic, was distorted by a few of its rank who tried to bully Petitioner into silence before the public hearing. After the hearing, the Respondents again attempted to silence Murray. Only when they were unsuccessful in convincing Murray to change his voiced opinions did they proceed to "investigate" him, place him publicly on probation, and eventually suspend him without pay.

The Petitioner's situation is akin to that in *McGee v. South Pemiscot School District,* 712 F.2d 39 (8th Cir. 1983). In *McGee,* a dispute arose as to whether a local school should have a track team. This controversy was publicizied in the local newspapers by the school board. The plaintiff, McGee, wrote a letter to the editor of a newspaper about the issue and, consequentially, was eventually discharged. The Eighth Circuit noted:

> This case stands on an entirely different footing from *Connick v. Myers*, ...We have before us a case where the plaintiff wrote a letter to a newspaper about *an issue that had already been publicly aired by the defendants*. *Id.* at 342, - 43 n. 4. (Emphasis added.)

While, in this case, Petitioner's speech was not broadcast publicly in the newspaper, petitioner's expression was *requested* by field office management after management first aired the issue. The school board in *McGee, supra,* only impliedly invited the teacher's comments. In our case, management *explicitly* invited Petitioner's comments; the foremost distinguishing feature between this case and *Connick, supra.*

2. Even If This Speech Is Determined Not To Be "Public Speech" It Should Be Protected Under The First Amendment Because It Fits The "Unusual Circumstances" Test of *Connick v. Myers.*

It is very rare indeed that the law and the facts of a case mesh perfectly so that the rule is clear to all. While Murray's comments must be protected speech because under the circumstances his opinions touched on "matters of public concern" as opposed to being upon "matters *only* of personal interest," (emphasis added) this case may best be decided as one of those "most unusual circumstances" which this Court included as an exception to trigger First Amendment protection. *Connick, supra,* states that a Federal Court may review agency action in "most unusual circimstance," even though speech is not directed at a public issue. Most unusual circumstances are present in this case. WFO management called the all-employees meeting so that employees might express their views on the lottery system (or to give the illusion that empoyees could express their views). When Petitioner spoke at the meeting, he addressed the topic for which the meeting was called. The Federal government, as an employer, should not be heard to say that it is interested in promoting a system whereby managers can ask employees for their opinions relating to an agency policy, and thereafter pretextually discipline the employee for that opinion. Implicit in the invitation to speak is the assurance that a price or penalty will not be extracted on account of what is said.

The principle stated here is not new, that is, that there are circumstances under which speech may be accorded First Amendment protections even though normally no such protection exists. This Court has stated that a public forum may be created for limited purposes or discussion of certain subjects. *Perry Education Association v. Perry Local Educators' Assn.*, 103 S. Ct. 948, 955 n.7 (1983). Restrictions on speech are permissible as long as they are not merely an effort to oppose the speaker's view. *Id.* at 955. Speech of an individual directed toward the purpose of the limited forum is protected by the First Amendment. *United States v. Albertini*, 710 F.2d 1410, 1416 (9th Cir. 1983).

In the case at bar, the management of the WFO created a forum specifically for the expression of views on a particular subject, a "lottery" form of furlough plan. They now argue that use of the forum is not a protected activity and that there should be no legal remedy when management retaliates against an employee who accepts management's invitation to speak. This retaliation, moreover, was in the form of the *maximum* discipline possible without the invocation of any employee administrative appeal rights, an action that is calculated to send the message that, "We are fair because you can speak your mind, but if we don't like what you say, we'll punish you."

Finally, this Court should rule that WFO management is estopped from asserting that these actions can be taken against Murray with impunity since the views of Murray were made at the request of WFO management. This is not a case such as *Connick, supra,* in which the employee was indeed initiating a palace revolt. Murray was merely responsing to Respondents' offer to speak at a meeting.

Accordingly, this Court must find either that Murray's speech was directed to a matter of public concern, or that "most unusual circumstances" existed; and, therefore, reverse that judgment of the Circuit Court.

B.

THE CIRCUIT COURT COMMITTED LEGAL ERROR IN RULING THAT THE PETITIONER STATED NO DUE PROCESS VIOLATION IN HIS COMPLAINT WHEN IT ALLEGED THAT THE RESPONDENTS DID NOT FOLLOW AGENCY REGULATIONS AND POLICY TO WHICH THE PETITIONER EMPLOYEE WAS ENTITLED.

The Court of Appeals affirmed the District Court's dismissal of the Fifth Amendment Due Process claim of the Petitioner, holding that Petitioner received sufficient process. He was not accorded all required process however, so the lower Court's ruling should be reversed.

This Court has clearly stated that under the Due Process clause of the Federal Constitution an individual is entitled to all of the procedural protections contained in agency regulations and orders even when such procedure affords an individual greater protections than would have existed without such regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539-540 (1959). *See also Mazaleski v. Treusdell*, 562 F.2d 701, 717-718 n.38, 183 U.S. App. D.C. 182 (D.C. Cir. 1977). This broad language has been interpreted by this Court to apply not only to decisions regarding employees, but also to circumstances which would affect an individual's eligibility for the benefits of Federal program. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The government conceded below the correctness of the proposition in *Hollingsworth v. Harris*, 608 F.2d 1026, 1027 (5th Cir. 1979). In *Morton* it was held that denial of benefits to an individual could not be sustained because the basis for denial was not published in the agency's manual, contrary to agency policy. The Court wrote:

> The Bureau of Indian Affairs (BIA), by its Manual, has declared that all directives that "inform the public of privileges and benefits available" and of "eligibility requirements" are among those to be published . . . [I]t [The Bureau of Indian Affairs] must comply, at a minimum, with its own internal procedures.

Morton, supra, at 235.

Under 5 U.S.C. § 7503 (b) (3), an employee against whom a suspension for fourteen days or less is proposed is entitled to be represented by an attorney. In a letter dated January 20, 1982, Respondent, Revell, an FBI supervisor, promised that several procedural protections would be provided Murray, including the right to the use of an attorney in all future proceedings. As stated in the complaint, the Respondents denied Petitioner his right to an attorney on three occasions despite his request that his attorney be permitted to be present.

A catalog of the statutory and agency protections, along with those rights promised Petitioner by the Respondents' letter dated January 20, 1982, are as follows:

a. Right to a review of the entire matter by an Executive Assistant Director of the FBI;

b. Right to respond to all charges;

c. Right to the use of an attorney in all future proceedings;

d. Right to a written decision from an Executive Assistant Director of the FBI shortly after thirty days from the date of the letter (January 20, 1982);

e. Right to a copy of all supporting documents; and,

f. Right to an appeal to the Merits System Protection Board if the suspension went into effect.

Of these guarantees, Murray was denied review of the matter by an Executive Assitant Director of the FBI; denied a written decision from an Executive Assistant Director of the FBI thirty days from the date of the January 20th letter; and denied a letter and appeal to the Merits Systems Protection Board. Furthermore, the Director of the FBI denied Murray's request for appeal.

Murray was denied the opportunity to present the matter to the Merit System Protection Board since the employer reduced his punishment so that he would not be eligible to present his case to a fair fact-finder.

This Court recently observed that, in personnel actions involving suspensions for fourteen days or less, there is no provision for redressing improper action by supervisors. *Bush v. Lucas*, 76 L.Ed.2d 648, 662 n.28 (1983). In *Bush* it was held that an individual who received full administrative proceedings could not then sue for relief in Federal court. The concurring opinion pointedly noted that injuries not protected by the Federal statutory scheme available on *Bush* can still be pursued under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29L.Ed.2d 619, 91 S. Ct. 1999 (1971). *Id.* at 665 (Marshall, J., Blackmun, J., concurring).

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957). The allegations in Petitioner's complaint, as set forth in the Factual Background, allege that the agency did not follow its own requirements, during the disciplinary action against Petitioner and that, therefore, his due process rights were violated. The lower Court did not acknowledge the validity of *Vitarelli, supra, and Morton, supra*, and instead cited *Mathews v. Eldridge*, 424 U.S. 319 (1976), for the proposition that "due process requirements vary according to the severity of the threatened loss." The *Mathews* case, however, deals with the requirements and balancing test by which the constitutional adequacy of an agency's procedures is considered. *Mathews, supra*, in no way decides or even suggests that an agency may ignore its own procedural requirements. The Petitioner's pay has been taken. His career has been blackened. Certainly a hearing before some agency is in order. Even under the *Mathews* standard, a fourteen day suspension and loss of pay hardly seem much less severe than the fifteen day suspension and pay loss necessary to trigger administrative appeal rights.

Perhaps the clearest error by the Circuit Court is its faulty reading of the due process protections provided in Title 5 of the Code. The Court cities several sections of Title 5 and writes that "Murray's suspension is not governed by the subchapter he

cites." *Murray v. Gardner, et al.* No. 83-1750, slip op. at 13 (D.C. Cir. August 14, 1984). Unfortunately, the court overlooked § 7503 of Title 5 which permits, *inter alia,* an attorney to represent the Petitioner in a fourteen day suspension case.

For these reasons, the Circuit Court erred in affirming the lower Court's dismissal of the due process claim and the judgment must be reversed.

CONCLUSION

This petition should be granted because the issue fundamentally affects the rights of thousands and of Federal employees to voice their opinions when invited to do so by their superiors without fear of reprisal by their superiors when the opinion voiced is disfavored. It is important that First Amendment protection be accorded this speech, since otherwise the public cannot expect "in house" criticism or suggestions on important matters will receive a hearing. Especially when the criticism expressed has been invited by management, the circumstance of retaliation is sufficiently "unusual" to fit that exception in *Connick, supra.* Fundamental fair dealing to Federal employees, and protection against "mind control" is at stake.

This case also presents squarely the due process issue reserved by the Court in *Bush, supra,* at footnote 28, and the concurring opinion by justices Marshall and Blackburn; that is, the right of an employee to sue in the absence of a Federal agency remedy for grievances. On the one hand the government argues that the Plaintiff has no agency right to any process including agency hearings and right to counsel. And on the other hand, the government's position is that the employee likewise has no remedy in Court. If the government prevails, there is no remedy whatsoever when supervisors decide to suspend without pay for fourteen days. Approximately two thousand dollars can be taken from Paul Murray's pocket and his career damaged, yet he can make no protest that anyone will hear. The result is that whenever supervisors want to arbitrarily discipline an employee

whose mind is not in conformance with a party line, so long as the suspension is fourteen days or less, their actions will be unchallenged. Here, Petitioner's supervisors must have clearly had this result in mind when they threatened a thirty day suspension, but cut it to the fourteen day maximum that is unreviewable. This is a government of laws and not men. This Court should not contenance such arbitrary Kafkaesque action. The Court should find that the complaint states course of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Petition for Certiorari has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

John D. Bates, Esquire
U.S. District Courthouse
Room 2820
3rd & Constitution Avenue, N.W.
Washington, D.C. 20001

By_____
Counsel